

DEC 19 2013

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. CC-13-1256-DKiTa
)	
JACQUELINE RODRIGUEZ,)	Bk. No. 12-23296-SC11
)	
Debtor.)	Adv. Proc. No. 13-01090-SC
)	
_____)	
BLADE ENERGY PTY LTD.; CLAIRE)	
ENERGY PTY LTD.; DEREK M.)	
WILLSHEE; JAMES R. ZADKO,)	
)	
Appellants,)	
)	
v.)	
)	
JACQUELINE RODRIGUEZ,)	M E M O R A N D U M ¹
)	
Appellee.)	
_____)	

Argued and Submitted on November 21, 2013
at Pasadena, California

Filed - December 19, 2013

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Scott C. Clarkson, Bankruptcy Judge, Presiding

Appearances: Todd B. Becker, Esq. argued for Appellants;
Julian Bach, Esq. argued for Appellee.

Before: DUNN, KIRSCHER and TAYLOR, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 The bankruptcy court dismissed Appellants' adversary proceeding
2 with prejudice as a sanction for their failure, through counsel, to
3 comply with initial discovery rules and the bankruptcy court's local
4 procedural rules. We AFFIRM.

5 I. FACTS

6 A. Background

7 Jacqueline Rodriguez filed a chapter 11² petition on
8 November 20, 2012. Blade Energy Pty Ltd. and its Chief Executive
9 Officer, Derek M. Willshee, and Claire Energy Pty Ltd. and its Chief
10 Executive Officer, James R. Zadko (collectively, "Appellants"),
11 filed an adversary proceeding against Ms. Rodriguez on March 5,
12 2013, seeking a determination that an alleged debt Ms. Rodriguez
13 owed them was nondischargeable in her bankruptcy case pursuant to
14 §§ 523(a)(2)(A), (a)(2)(B), (a)(4), and (a)(6).³

15 Appellants' claims against Ms. Rodriguez were based upon her
16 status and alleged actions as a shareholder and principal of
17 Olecram LLC ("Olecram"), which Ms. Rodriguez owned with her husband,
18

19 ² Unless otherwise indicated, all chapter and section
20 references are to the federal Bankruptcy Code, 11 U.S.C.
21 §§ 101-1532, all "Rule" references are to the Federal Rules of
22 Bankruptcy Procedure, Rules 1001-9037, all "Civil Rule" references
23 are to the Federal Rules of Civil Procedure, and the Local Rules for
the Bankruptcy Court for the Central District of California are
referred to as "LBR's."

24 ³ Because this is an appeal on procedural grounds rather than
25 substantive law, we do not quote the text of the statutes pursuant
26 to which Appellants were seeking relief in the adversary proceeding.
It is sufficient to note that they implicate Ms. Rodriguez's
discharge.

1 Flavio Rodriguez.⁴ Olecram is a California limited liability
2 company which brokered large financial transactions for businesses
3 in need of funding.

4 Appellants alleged that, beginning in May 2006, they engaged
5 the services of Olecram to secure operating capital in the form of
6 secured loans. They paid Olecram \$500,000 to obtain a \$200,000,000
7 line of credit on their behalf to fund oil projects in Turkey.
8 Appellants further alleged that, in exchange for this fee, they
9 received false and fraudulent banking documents and guarantee
10 letters, but no funds. They also alleged, without specifying how,
11 that they were lulled and beguiled into pursuing a second funding
12 opportunity through Olecram, such that in July of 2008 they paid
13 \$250,000 to Olecram in order to obtain \$20,000,000 in emergency
14 funding while waiting for receipt of the main loan proceeds. Again,
15 Appellants received no loan funds as a result of the second payment
16 to Olecram.

17 _____
18 ⁴ Appellants name Ms. Rodriguez as the defendant both in the
19 caption and in the introductory paragraph of their complaint and
20 assert that they are seeking "redress for a scheme by which the
21 defendant, acting in concert with other entities and individuals,
22 deceived and defrauded [Appellants] and misappropriated
23 [Appellants'] property." In addition to Mr. Rodriguez and Olecram,
24 Appellants name as the "other entities and individuals" involved in
25 the scheme JNDDC LLC, Jeffrey Spence, David McGirt and Julian Bach.
26 Mr. Bach was Ms. Rodriguez's attorney in the adversary proceeding
and continues as her counsel in this appeal. Mr. Bach also was
counsel to Olecram and to Mr. and Ms. Rodriguez at all relevant
times.

After identifying the "other entities and individuals," the
complaint thereafter alleges conduct of the "defendants," not of
Ms. Rodriguez specifically.

1 Notwithstanding their lack of success in obtaining financing
2 through Olecram's efforts, in November of 2009, Appellants again
3 sought Olecram's assistance in obtaining a \$10,000,000 loan to fund
4 an oil project in Bakersfield, California. Rather than paying a fee
5 to Olecram for obtaining funds for the Bakersfield project on their
6 behalf, the Appellants entered into an agreement with Olecram
7 pursuant to which Olecram would receive a 50% interest in the
8 Bakersfield project. Ultimately, only \$386,000 was obtained to
9 finance the Bakersfield project.

10 Further, Appellants alleged they learned in June of 2010 that
11 these funds were not obtained from a lender who had agreed to
12 finance the Bakersfield project but instead from \$1,500,000 that had
13 been misappropriated from a local real estate company. Appellants
14 asserted that when they learned of the "defendants'" illegal and
15 fraudulent conduct, they removed "defendants" from the Bakersfield
16 project and terminated all business dealings with Ms. Rodriguez "and
17 her affiliates and cooperating persons and entities." The complaint
18 sought: (1) damages in the amount of \$750,000, representing the fees
19 paid to Olecram to secure funding for the Turkey project, together
20 with lost prospective profits and damage to their business
21 reputation when the Turkey and Bakersfield projects collapsed
22 because of a lack of funding; and (2) a determination that the debt
23 represented by these damages was nondischargeable in Ms. Rodriguez's
24 bankruptcy case.

25 B. Procedure

26 Appellants served the adversary complaint and summons on

1 Ms. Rodriguez on March 7, 2013. As required by the LBRs, Appellants
2 served a copy of the bankruptcy court's "Early Meeting of Counsel
3 and Status Conference Instructions" ("Rule 26 Instructions") with
4 the summons and complaint.

5 The Rule 26 Instructions notified all parties that compliance
6 with LBR 7026-1 was required. It further mandated that the parties
7 were to meet and confer as contemplated by Civil Rule 26(f)
8 ("Rule 26 Meeting") "at least 21 days before the status conference
9 date [{"Initial Status Conference"}] set forth in the summons" and
10 detailed what was to be discussed and accomplished at the Rule 26
11 Meeting. The Rule 26 Instructions also directed the filing of a
12 Joint Status Report with respect to the Rule 26 Meeting "within the
13 time frames specified within Local Rule 7016-1(a)(2)."

14 Alternatively, the Rule 26 Instructions required Appellants to file
15 a Unilateral Status Report seven days prior to the Initial Status
16 Conference if Ms. Rodriguez had not filed and served an answer to
17 the complaint.

18 Paragraph 10 of the Rule 26 Instructions stated in bold print
19 the sanctions the bankruptcy court could impose if the Rule 26
20 Instructions were not complied with:

21 Failure to comply with these instructions may subject the
22 responsible party and/or counsel to sanctions, which may
23 include dismissal of the adversary proceeding. The
24 failure of either party to cooperate in the preparation or
25 timely filing of a Joint Status Report or appear at the
26 status conference may result in the imposition of
sanctions under [Local Rule] 7016-1(f) or (g).

25 The summons provided notice that the Initial Status Conference
26 was set for May 23, 2013, thereby establishing May 2, 2013 as the

1 deadline for the Rule 26 Meeting, May 9, 2013 as the deadline for
2 filing a Joint Status Report, and May 16, 2013 for filing a
3 Unilateral Status Report if no Joint Status Report had been filed.
4 The summons also provides an explicit warning of the consequences of
5 failing to file a timely status report:

6 You must comply with [Local Rule] 7016-1, which requires
7 you to file a joint status report and to appear at a
8 status conference. All parties must read and comply with
9 the rule, even if you are representing yourself. You
10 must cooperate with the other parties in the case and
11 file a joint status report with the court and serve it on
12 the appropriate parties at least 14 days before a status
13 conference. A court-approved joint status report form is
14 available on the court's website ([Local] form F 7016-
15 1.1) with an attachment for additional parties if
16 necessary ([Local] form F 7016-1.1a). If the other
17 parties do not cooperate in filing a joint status report,
18 you still must file with the court a unilateral status
19 report and the accompanying required declaration instead
20 of a joint status report 7 days before the status
21 conference. **The court may fine you or impose other
22 sanctions if you do not file a status report. The court
23 may also fine you or impose other sanctions if you fail
24 to appear at a status conference.**

25 (Emphasis in original.)

26 Ms. Rodriguez did not file an answer to the complaint, but
instead, on April 4, 2013, filed a motion ("Dispositive Motion")
asserting alternatively that the complaint should be dismissed for
failure to state a claim upon which relief could be granted or that
she was entitled to judgment as a matter of law. The hearing on the
Dispositive Motion was set for the same time as the initial status
conference in the adversary proceeding.

The record reflects that Appellants opposed the Dispositive
Motion on May 2, 2013. Of the documents filed in opposition,
however, only one was provided for our consideration on appeal.

1 That document is the "Declaration In Support of Request for Denial
2 or Continuance of Summary Judgment Under [Civil Rule] 56(d)" ("First
3 Becker Declaration"). In the First Becker Declaration, Todd B.
4 Becker, counsel for Appellants, asserted that the Dispositive Motion
5 was "premature due to the total lack of discovery in this action"
6 and that "discovery is essential to present further evidence to the
7 court of a genuine dispute in this matter."

8 Significantly, after serving the summons and complaint,
9 Mr. Becker took no action prior to the deadline for the Rule 26
10 Meeting to comply with the Rule 26 Instructions. Mr. Bach sent
11 written correspondence to Mr. Becker on May 2, 2013, by both
12 facsimile transmission and U.S. Mail, in which he requested that the
13 Rule 26 Meeting be scheduled and that the Joint Status Report be
14 prepared. Receiving no response, Mr. Bach sent follow-up
15 correspondence, again by facsimile transmission and U.S. Mail, on
16 May 6, 2013, with the same result. In both letters, Mr. Bach
17 explicitly advised Appellants' counsel of the requirements of the
18 bankruptcy court's local rules with respect to the timing of the
19 Rule 26 Meeting and the filing of a Joint Status Report.

20 On May 9, 2013, Ms. Rodriguez filed a Unilateral Status Report
21 ("Rodriguez Status Report") supported by the Declaration of Mr. Bach
22 ("Bach Declaration"), which advised the bankruptcy court that no
23 Rule 26 Meeting had taken place, and that "Counsel for Plaintiffs
24 has been totally non-responsive regarding the Rule 26 [Meeting]
25 and/or [Local Rule] 7026-1 making it difficult for [Ms. Rodriguez]
26 to speculate as to how it is that she has any debt to these

1 'Plaintiffs' and/or that any such debt is nondischargeable." The
2 Rodriguez Status Report and the Bach Declaration were served on
3 Mr. Becker.

4 Mr. Becker finally sent Mr. Bach a letter via facsimile
5 transmission on May 14, 2013 ("May 14 Letter"), outlining
6 Appellants' views on the issues to be discussed at the Rule 26
7 Meeting.⁵ That letter proposed that initial disclosures be made
8 within 14 days following the Rule 26 Meeting and requested dates for
9 taking the depositions of both Ms. Rodriguez and Mr. Rodriguez. In
10 response to the May 14 Letter, Mr. Bach left voice mail messages for
11 Mr. Becker on both May 15 and May 16, requesting a Rule 26 Meeting
12 by telephone. Although those messages asked for a return telephone
13 call and expressed hope that a Joint Status Report still could be
14 prepared, Mr. Becker did not contact Mr. Bach on either of those
15 dates. Mr. Becker alleged that he called Mr. Bach's office twice
16 after sending the May 14 Letter, finally leaving a voice mail
17 message for Mr. Bach on May 17, 2013. The record reflects that
18 Mr. Bach did not respond to that voice mail message because he was
19 out of the office on May 17.⁶ However, Mr. Bach sent Mr. Becker a
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21 ⁵ The May 14 Letter appears to suggest that there was nothing
22 to discuss at a Rule 26 Meeting because the claims and positions of
23 the parties were, in Mr. Becker's view, adequately set forth in the
Dispositive Motion and Appellants' opposition thereto.

24 ⁶ At Mr. Becker's request, Mr. Bach provided a letter
25 confirming that Mr. Becker had left a voice mail message on May 17,
26 2013. That letter also confirmed that Mr. Bach was out of the
office on that day.

1 letter on May 19, 2013, which again requested that Mr. Becker
2 contact Mr. Bach and which also pointed out that no status report
3 had been filed on behalf of Mr. Becker's clients.

4 Ultimately, the Rule 26 Meeting took place by telephone on
5 May 20, 2013. It was of limited usefulness. Mr. Bach "got a fairly
6 quick, clear impression that [Mr. Becker] had limited to no
7 familiarity with the claims set forth in the Complaint." On May 20,
8 2013, following the Rule 26 Meeting, Appellants filed their
9 Unilateral Status Report ("Appellants' Status Report"), indicating
10 that the Rule 26 Meeting had taken place on that same date.

11 On the afternoon before the Initial Status Conference, the
12 bankruptcy court posted its tentative ruling evincing an intent to
13 dismiss the adversary proceeding because Appellants had not filed a
14 status report. At 6:00 p.m. on May 22, 2013, the evening before the
15 Initial Status Conference, Mr. Becker filed a declaration ("Second
16 Becker Declaration") stating that the Appellants' Status Report in
17 fact had been filed on May 20, 2013, and that a chambers copy had
18 been delivered "thereafter" to the bankruptcy court.⁷ The Second
19 Becker Declaration states that Appellants' counsel had not earlier
20 had an opportunity to meet and confer.⁸ The Second Becker

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22 ⁷ The messenger service delivered the copy on May 21, 2013 at
23 2:45 p.m., less that 48 hours prior to the Initial Status
24 Conference.

25 ⁸ Mr. Becker also served on May 22, 2013, a notice of
26 Ms. Rodriguez's deposition, which he unilaterally set for June 27,
2013, because the timing of the deposition had not been discussed at
the Rule 26 Meeting.

1 Declaration was cast in terms to suggest that Mr. Bach had been
2 dilatory in facilitating the Rule 26 Meeting and in complying with
3 the LBRs with respect to the filing of a status report.

4 Mr. Bach filed a supplemental declaration ("Second Bach
5 Declaration") in support of the Rodriguez Status Report at 7:20 a.m.
6 on the day of the Initial Status Conference, through which he
7 informed the bankruptcy court of the numerous efforts he had
8 undertaken to engage Mr. Becker in the Rule 26 process.

9 On May 23, 2013, the bankruptcy court conducted the Initial
10 Status Conference, opening with a statement that it wanted to create
11 a time line for the record. The bankruptcy court noted that
12 Appellants' Status Report was filed only three days before the
13 Initial Status Conference. The bankruptcy court then took issue
14 with the content of Appellants' Status Report to the extent it
15 answered in the affirmative the question, "Have counsel met and
16 conferred in compliance with [Local Rule] 7026-1?" Although
17 Mr. Becker initially (and vigorously) argued that he had complied
18 with the meet and confer requirements of the Civil Rules and the
19 LBRs, he ultimately (and reluctantly) conceded that he had not
20 "technically" complied because the Rule 26 Meeting was not conducted
21 within the time specified by the LBRs, nor was Appellants' Status
22 Report timely filed. The bankruptcy court also took Appellants'
23 counsel to task for the content of the Second Becker Declaration,
24 which "on a cold read" suggested that the only status report filed
25 in the adversary proceeding was Appellants' Status Report.

26 The bankruptcy court then asked Mr. Becker to explain the

1 circumstances that prevented him from having an earlier opportunity
2 to meet and confer with opposing counsel as averred in the Second
3 Becker Declaration. Mr. Becker responded that his failure to meet
4 and confer timely was the result of an error in calendaring
5 deadlines in the adversary proceeding. When the bankruptcy court
6 suggested that the several attempts Mr. Bach had made to alert
7 Mr. Becker to the required deadlines and his responsibilities in
8 relation to those deadlines undercut any "excuse" of miscalendering,
9 Mr. Becker blamed his lack of compliance on the failure of his
10 associate to advise him of Mr. Bach's communications.⁹ He then
11 assured the bankruptcy court that both the calendaring issue and the
12 communication issue within his office had been resolved upon review
13 of the bankruptcy court's tentative ruling.

14 Notwithstanding Mr. Becker's request that the bankruptcy court
15 impose monetary sanctions upon him rather than impose a dismissal
16 sanction to the detriment of his clients, the bankruptcy court
17 dismissed the adversary proceeding with prejudice.¹⁰ While the
18 bankruptcy court created the time line to establish a record that in

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20 ⁹ Mr. Bach pointed out for the record that Mr. Becker had
21 stated in the First Becker Declaration: "I . . . am counsel for
22 plaintiff [sic] in this adversary action. I have handled this case
since its inception."

23 ¹⁰ In commenting on the fact that the adversary proceeding was
24 dismissed with prejudice, the bankruptcy court stated: "And I'll
25 tell you why it's with prejudice. It has nothing to do with my
26 determination, it's because you can't file it again. You're out of
time on the statute of limitations." Tr. of May 23, 2013 Hr'g at
29:5-8. See Rule 4007(c).

1 the adversary proceeding, Appellants had wholly failed to comply
2 with the time requirements of the Civil Rules and the Local Rules in
3 the pretrial proceedings, the bankruptcy court also expressed a
4 desire to address a "systemic" issue by imposing greater sanctions
5 than the monetary sanctions it typically imposed on counsel, which,
6 in the view of the bankruptcy judge, had proven ineffective both
7 over time and in the case before him.¹¹ Appellants filed a timely
8 notice of appeal from the dismissal order.

9 II. JURISDICTION

10 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
11 and 157(b)(2)(b) and (k). We have jurisdiction under 28 U.S.C.
12 § 158.

13 III. ISSUE

14 Whether the bankruptcy court abused its discretion when it
15 dismissed the adversary proceeding with prejudice.

16 IV. STANDARDS OF REVIEW

17 The bankruptcy court's dismissal of an adversary proceeding
18 based upon plaintiffs' failure to prosecute is reviewed for an abuse
19 of discretion. Al-Torki v. Kaempfen, 78 F.3d 1381, 1384 (9th Cir.
20 1996); Moneymaker v. CoBEN (In re Eisen), 31 F.3d 1447, 1451 (9th
21 Cir. 1994).

22 We apply a two-part test to determine whether the bankruptcy
23

24 ¹¹ "My intention and my inclination is to dismiss this case.
25 I'm tired. I am just tired of in and out, daily, people don't -
26 they're not caring about the Local Rules." Tr. of May 23, 2013 Hr'g
at 16:20-22.

1 court abused its discretion. United States v. Hinkson, 585 F.3d
2 1247, 1261-62 (9th Cir. 2009)(en banc). First, we consider de novo
3 whether the bankruptcy court applied the correct legal standard to
4 the relief requested. Id. Then, we review the bankruptcy court's
5 fact findings for clear error. Id. at 1262 & n.20. We must affirm
6 the bankruptcy court's fact findings unless we conclude that they
7 are "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in
8 inferences that may be drawn from the facts in the record.'" Id.
9 "Under the 'clear error' standard, we accept findings of fact unless
10 the findings leave 'the definite and firm conviction that a mistake
11 has been committed by the trial judge.'" Wolkowitz v. Beverly
12 (In re Beverly), 374 B.R. 221, 230, aff'd in part & dismissed in
13 part, 551 F.3d 1092 (9th Cir. 2008), citing Latman v. Burdette,
14 366 F.3d 774, 781 (9th Cir. 2004).

15 V. DISCUSSION

16 Resolution of this appeal requires an examination of the
17 interplay between and among various Civil Rules, Rules, and LBRs
18 which operate to ensure the efficient adjudication of adversary
19 proceedings.

20 Rule 7016 provides that Civil Rule 16 applies in adversary
21 proceedings. Civil Rule 16(a) identifies several purposes for
22 setting pretrial conferences, such as the Initial Status Conference
23 in the instant dispute. Those purposes relevant to this appeal
24 include expediting disposition of the adversary proceeding and
25 establishing early and continuing control so that the adversary
26 proceeding will not be protracted because of lack of management.

1 See Civil Rule 16(a)(1) and (2). LBR 7016-1 serves to implement
2 Civil Rule 16's purposes in adversary proceedings, and provides:

3 7016-1. STATUS CONFERENCE, PRETRIAL, AND TRIAL PROCEDURE

4 (a) Status Conference. In any adversary proceeding, the
5 clerk will issue a summons and notice of the date and time
6 of the status conference.

7 (1) Who Must Appear. Each party appearing at any status
8 conference must be represented by either the attorney (or
9 party, if not represented by counsel) who is responsible
10 for trying the case or the attorney who is responsible for
11 preparing the case for trial.

12 (2) Contents of Joint Status Report. Unless otherwise
13 ordered by the court, at least 14 days before the date set
14 for each status conference the parties are required to
15 file a joint status report discussing the following:

16 (A) State of discovery, including a description of
17 completed discovery and detailed schedule of
18 all further discovery then contemplated;

19 (B) Deadline for all discovery to be completed,
20 including the date by which all responses to
21 discovery requests are due;

22 (C) A schedule of then contemplated law and motion
23 matters;

24 (D) Prospects for settlement;

25 (E) A proposed date for the pretrial conference
26 and/or the trial;

(F) Whether counsel have met and conferred in
27 compliance with LBR 7026-1, and if so, the date
28 of the conference;

(G) Any other issues affecting the status or
29 management of the case; and

(H) Whether the parties are interested in
30 alternative dispute resolution.

(3) Unilateral Status Report. If any party fails to
31 cooperate in the preparation of a joint status report and
32 a response has been filed to the complaint, each party
33 must file a unilateral status report not less than 7 days
34 before the date set for each status conference, unless
35 otherwise ordered by the court. The unilateral status
36 report must contain a declaration setting forth the
37 attempts made by the party to contact or obtain the
38 cooperation of the non-complying party.

39 Rule 7026 provides that Civil Rule 26 applies in adversary

1 proceedings. Civil Rule 26 provides in relevant part:

- 2 (f) Conference of the Parties; Planning for Discovery.
3 (1) Conference Timing. Except in a proceeding exempted
4 from initial disclosure under [Civil] Rule 26(a)(1)(B) or
5 when the court orders otherwise, the parties must confer
6 as soon as practicable - and in any event at least 21 days
7 before a scheduling conference is to be held

8 LBR 7026-1 sets out in detail the obligations of the parties to an
9 adversary proceeding to participate in discovery.

10 LBR 7026-1. DISCOVERY

11 (a) General. Compliance with [Rule] 7026 and this rule is
12 required in all adversary proceedings.

13 (1) Notice. The plaintiff must serve with the summons and
14 complaint a notice that compliance with [Rule] 7026 and
15 this rule is required.

16 (2) Proof of Service. The plaintiff must file a proof of
17 service of this notice together with the proof of service
18 of the summons and complaint.

19 (b) Discovery Conference and Disclosures.

20 (1) Conference of Parties. Unless all defendants default,
21 the parties must conduct the meeting and exchange the
22 information required by [Rule] 7026 within the time limits
23 set forth therein.

24 (2) Joint Status Report. Within 7 days after such meeting,
25 the parties must prepare a joint status report containing
26 the information set forth in LBR 7016-1(a)(2). The joint
status report will serve as the written report of the
meeting required by [Rule] 7026.

The consequences of failing to comply with the foregoing Rules,
Civil Rules, and LBRs also are explicit within their terms.

LBR 7016-1 provides:

(f) Sanctions for Failure to Comply with Rule. In addition
to the sanctions authorized by [Civil Rule] 16(f), if a
status conference statement or a joint proposed pretrial
stipulation is not filed or lodged within the times set
forth in subsections (a), (b), or (e), respectively, of

1 this rule, the court may order one or more of the
2 following:

3 (1) A continuance of the trial date, if no prejudice is
involved to the party who is not at fault;

4 (2) Entry of a pretrial order based [upon] conforming
5 party's proposed description of the facts and law;

6 (3) An award of monetary sanctions including attorneys'
7 fees against the party at fault and/or counsel, payable to
the party not at fault; and/or

8 (4) An award of non-monetary sanctions against the party
9 at fault including entry of judgment of dismissal or the
entry of an order striking the answer and entering a
default.

10 (g) Failure to Appear at Hearing or Prepare for Trial. The
11 failure of a party's counsel (or the party, if not
12 represented by counsel) to appear before the court at the
13 status conference or pretrial conference, or to complete
14 the necessary preparations therefor, or to appear at or to
15 be prepared for trial may be considered an abandonment or
failure to prosecute or defend diligently, and judgment
may be entered against the defaulting party either with
respect to a specific issue or as to the entire
proceeding, or the proceeding may be dismissed.

16 (Emphasis added.) LBR 7026-1(4) provides:

17 (4) Cooperation of Counsel; Sanctions. The failure of any
18 counsel either to cooperate in this procedure, to attend
19 the meeting of counsel, or to provide the moving party the
20 information necessary to prepare the stipulation required
by this rule within 7 days of the meeting of counsel will
result in the imposition of sanctions, including the
sanctions authorized by [Civil Rule] 7037 and LBR 9011-3.

21 (Emphasis added.)

22 It is undisputed that Appellants were required to participate
23 in the Rule 26 Meeting no later than May 2, 2013, and that they were
24 to file either a Joint Status Report no later than May 9, 2013, or a
25 Unilateral Status Report no later than May 16, 2013. They met none
26 of these deadlines. Appellants emphasize that while the deadlines

1 were not met, a Rule 26 Meeting was held and a Unilateral Status
2 Report was filed before the Initial Status Conference. They assert
3 that dismissal of the adversary proceeding was an excessive
4 sanction, particularly in light of the fact that the adversary
5 proceeding had been pending for less than three months and the
6 dismissal occurred at the Initial Status Conference.

7 It is true that “[d]ismissal is a harsh penalty and is to be
8 imposed only in extreme circumstances.” Henderson v. Duncan,
9 779 F.2d 1421, 1423 (9th Cir. 1986). “Nevertheless, we will
10 overturn a dismissal sanction only if we have a definite and firm
11 conviction that it was clearly outside the acceptable range of
12 sanctions.” Malone v. U.S. Postal Service, 833 F.2d 128, 130 (9th
13 Cir. 1987)(citation omitted).

14 As the Ninth Circuit stated in Malone, there are five factors a
15 trial court must weigh in determining whether to dismiss a case for
16 lack of prosecution. These include: (1) the public’s interest in
17 expeditious resolution of litigation; (2) the court’s need to manage
18 its docket; (3) the risk of prejudice to the defendant; (4) the
19 public policy favoring disposition of cases on their merits; and
20 (5) the availability of less drastic sanctions. Malone, 833 F.2d
21 130; Thompson v. Hous. Auth., 782 F.2d 829, 832 (9th Cir.), cert.
22 denied, 479 U.S. 829 (1986).

23 Because the bankruptcy court did not make explicit findings to
24 show it specifically considered the Malone factors in imposing a
25 dismissal sanction, we review the record independently. Malone,
26 833 F.2d at 130. In this case, standing alone in Appellants’ favor

1 is the public policy favoring disposition of cases on their merits.
2 Notwithstanding this factor, the record supports the imposition of
3 the dismissal sanction.

4 First, as identified above, the expeditious resolution of
5 litigation and the court's need to manage its docket are two of the
6 express purposes of Civil Rule 16, pursuant to which the obligations
7 on Appellants arose. Judicial resources are stretched thin.
8 Without procedural rules to manage and move voluminous caseloads
9 through the system, the public interest will suffer. As the adage
10 goes: "Justice delayed is justice denied." The record reflects
11 that Mr. Becker requested a continuance of resolution of the
12 Dispositive Motion on the basis that discovery was needed at a time
13 when he still was two weeks away from initiating any attempt to
14 comply with the Rule 26 Meeting requirement.

15 Second, the bankruptcy court clearly considered the adequacy of
16 less drastic sanctions.¹² The bankruptcy court stressed that the
17 problem of missed deadlines had become systemic. That Mr. Becker
18 did not take seriously the obligations imposed upon his clients by
19 the collective rules governing pretrial proceedings in adversary
20 proceedings until dismissal of the adversary proceeding was imminent
21

22
23 ¹² A warning that failure to follow a procedure can result in
24 dismissal of an adversary proceeding supports a determination that a
25 court has considered alternative sanctions. See Buss v. Western
26 Airlines, Inc., 738 F.2d 1053, 1054 (9th Cir. 1984), cert. denied,
469 U.S. 1192 (1985). LBR 7016-1(f) and (g) and LBR 7026-1(4) all
provided notice that dismissal was a possible sanction for
noncompliance with the rules.

1 is evident in the record. Not only did Mr. Becker not heed the
2 Rule 26 Instructions or the specific requirements of the various
3 iterations of [Civil Rules] 16 and 26, he also ignored the multiple
4 attempts by Mr. Bach to gain his cooperation in moving the adversary
5 proceeding forward. When challenged by the bankruptcy court on his
6 missteps, Mr. Becker had difficulty understanding, in effect, what
7 all the fuss was about. This lack of comprehension of the impact of
8 dilatory practice on the operation of a trial court is exactly why a
9 sanction stronger than a monetary sanction was warranted in this
10 case. As observed by the bankruptcy court, in a finding that we are
11 not in a position to challenge, the practice culture of the bar that
12 appears before the bankruptcy court appears to have relegated
13 monetary sanctions for noncompliance with procedural rules to a cost
14 of doing business.

15 Third, the failure to prosecute the adversary proceeding in
16 accordance with the rules governing the initial discovery conference
17 and the formulation of a joint status report prejudiced
18 Ms. Rodriguez. As stated in the Rodriguez Status Report,
19 Ms. Rodriguez filed the Dispositive Motion because she did not
20 believe she owed any obligation to Appellants. Mr. Becker's
21 non-responsiveness regarding the Rule 26 Meeting made it difficult
22 for Ms. Rodriguez to speculate "how it is that she has any debt to
23 [Appellants] and/or that any such debt is nondischargeable." The
24 fact that the pending adversary proceeding implicated
25 Ms. Rodriguez's discharge required vigilant prosecution to ensure
26 prompt resolution.

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VI. CONCLUSION

In light of the Malone factors, we do not have a definite and firm conviction that the dismissal sanction was clearly outside the acceptable range of sanctions. Chism v. Nat'l Heritage Life Ins. Co., 637 F.2d 1328, 1331 (9th Cir. 1981). Accordingly, we AFFIRM.¹³

¹³ Shortly before oral argument in this appeal, the Appellants filed the "Declaration of Garrett M. Brief, Esq. Re: Current Status Of Underlying Bankruptcy Case" ("Brief Declaration"). The Brief Declaration advised, among other things, that Ms. Rodriguez's chapter 11 case had been converted to chapter 7 by order entered on November 19, 2013. At oral argument, Appellants cited Classic Auto Refinishing, Inc. v. Marino (In re Marino), 181 F.3d 1142, 1144-46 (9th Cir. 1999), as establishing the qualified proposition that the conversion of a bankruptcy case from chapter 11 to chapter 7 authorizes the filing of a new nondischargeability complaint in the chapter 7 case, notwithstanding that a nondischargeability complaint had been filed but subsequently dismissed with prejudice as untimely in the chapter 11 case. See Rule 1019(2)(A).

The subsequent conversion of the case does not render the bankruptcy court's decision to declare the dismissal of the adversary proceeding "with prejudice" on limitations grounds error within the context of the appeal before us.